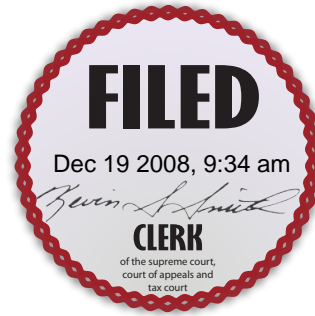


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOEL HAWN,

Appellant-Plaintiff,

vs.

ISPAT INLAND, INC.,

Appellee-Defendant.

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No. 93A02-0807-EX-600

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APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD  
Application No. C-151960

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**December 19, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Joel Hawn filed an Application for Adjustment of Claim with the Worker's Compensation Board of Indiana (the "Board") against his employer, ISPAT Inland, Inc. ("Inland"). Inland moved the Board to dismiss the Application, and a Single Hearing Member granted that motion. Thereafter, Hawn petitioned the Full Board, which affirmed the Single Hearing Member's dismissal. Hawn now appeals and presents a single issue, namely, whether the Board properly dismissed his Application pursuant to Indiana Code Section 22-3-2-13.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On December 22, 1999, Hawn filed his Application against Inland for injuries he received in the course and scope of his employment on December 24, 1997, when an Indiana Harbor Belt train collided with the truck Hawn was driving in East Chicago. Also on December 22, 1999, Hawn filed a complaint in the Lake Superior Court against Indiana Harbor Belt Railroad ("third party lawsuit"). Proceedings on Hawn's Application with the Board were essentially put on hold pending the outcome of the third party lawsuit. Hawn did not receive any payments from Inland's worker's compensation carrier.

On April 26, 2004, Hawn settled the third party lawsuit for \$15,000. And on May 19, Inland wrote to Hawn that "under I.C. [§] 22-3-2-13 once an employee settles a third party action the liability of the employer to pay further compensation terminates." Appellant's App. at 49. Accordingly, Inland asked that Hawn voluntarily dismiss his

Application with the Board. Thereafter, Inland and Hawn “informally discussed” the issue with a Single Hearing Member, who indicated that she “would not rule favorably on such Motion.” Brief of Appellee at 2, Appellant’s App. at 15.

Nevertheless, on January 27, 2006, Inland filed a motion to dismiss Hawn’s Application. And on February 23, 2007, Hawn filed a response to that motion. On March 2, 2007, the Single Hearing Member denied Inland’s motion to dismiss. But on July 16, 2007, Inland filed a motion to reconsider that denial, and on November 8, the Single Hearing Member granted the motion to reconsider and dismissed Hawn’s Application. Hawn petitioned the Full Board to review the dismissal, and, following a hearing, the Full Board affirmed the Single Hearing Member. This appeal ensued.

### **DISCUSSION AND DECISION**

In challenging the Board’s decision, Hawn confronts a stringent standard of review. When we review a decision of the Full Worker’s Compensation Board, “we are bound by the factual determinations of the Board and will not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion.” Howard v. U.S. Signcrafters, 811 N.E.2d 479, 481 (Ind. Ct. App. 2004). We must disregard all evidence unfavorable to the decision and examine only the evidence and the reasonable inferences therefrom that support the Board’s findings. Id. We will not reweigh the evidence nor judge the credibility of the witnesses. Id. Where, as here, a question of law is presented, our standard of review is de novo. Gray v. Daimler Chrysler Corp., 821 N.E.2d 431, 434 (Ind. Ct. App. 2005).

Indiana Code Section 22-3-2-13 provides in relevant part:

In the event the injured employee or his dependents, not having received compensation or medical, surgical, hospital or nurses' services and supplies or death benefits from the employer or the employer's compensation insurance carrier, shall procure a judgment against the other party for injury or death, which judgment is paid, or if settlement is made with the other person either with or without suit, then the employer or the employer's compensation insurance carrier shall have no liability for payment of compensation or for payment of medical, surgical, hospital or nurses' services and supplies or death benefits whatsoever[.]

And in interpreting that statute, this Court has held that an employee must obtain an employer's consent prior to settlement with a third party if the employee wants to obtain worker's compensation benefits in addition to the settlement. See Doerr v. Lancer Trans. Servs., 868 N.E.2d 890, 894 (Ind. Ct. App. 2007), trans. denied.

Here, the Single Hearing Member found that Hawn had entered into a settlement agreement with Indiana Harbor Belt Railroad without prior written consent from Inland. The Single Hearing Member further found that Inland had not paid any worker's compensation benefits to Hawn. Accordingly, the Single Hearing Member concluded:

1. Indiana Code § 22-3-2-13 states that if an employee settles a third party case and the employer has not paid any worker's compensation benefits, the settlement in the third party case relieves the employer from liability for payment of benefits and bars further recovery by the employee under the Worker's Compensation Act.

2. The Indiana Court of Appeals recently construed this provision in Doerr, reversing a decision by the Full Worker's Compensation Board, and holding that the Worker's Compensation Board may not overcome the bar to recovery of benefits under the Worker's Compensation Act by allowing the employee to refund, offset or otherwise disregard a third party settlement entered into without the employer's prior written consent.

[3.] In the instant case, [Inland's] lack of prior written consent to [Hawn's] settlement with [Indiana Harbor Belt Railroad], combined with the fact that [Inland] has paid no benefits under the Worker's Compensation Act, serves to bar [Hawn's] recovery of benefits pursuant to Indiana Code § 22-3-2-13.

[4.] In the instant case, [Hawn's] attempt to distinguish Doerr on the basis that prior notice or prior knowledge may serve as a substitute for prior written consent is refuted by the unambiguous language of the Indiana Court of Appeals in Doerr requiring prior written consent.

[5.] As [Hawn] is unable to recover benefits under the Worker's Compensation Act for his injury, [Hawn's] Application for Adjustment of Claim must be dismissed.

Appellant's App. at 102-03.

On appeal, Hawn contends that the Board's reliance on this court's opinion in Doerr was misplaced and that our Supreme Court's opinion in DePuy, Inc. v. Farmer, 847 N.E.2d 160 (Ind. 2006), is controlling. In particular, Hawn maintains that:

The Supreme Court in DePuy stated that the employer is adequately protected if the settlement monies are held intact and not distributed. Therefore, an injured worker is entitled to proceed in the worker's compensation case even after the third party claim is settled and, if the award is greater than what he received in settlement, the worker would be entitled to receive the additional monies.

Brief of Appellant at 8.

While we generally agree with Hawn's assessment of the holding in DePuy, Hawn's case is clearly distinguishable. The third party lawsuit in DePuy was against the plaintiff's coworker, and the Court observed that Indiana Code Section 22-3-2-13, "by its terms . . . does not apply to a claim against a fellow employee." See DePuy, 847 N.E.2d at 169. Hawn has not demonstrated that DePuy controls here, where Hawn was not injured by a coworker, and Indiana Code Section 22-3-2-13 applies.

This court's more recent opinion in Doerr is directly on point and supports the dismissal of Hawn's Application. In Doerr, the plaintiff filed an Application for adjustment of claim with the Board for injuries he sustained within the scope of his

employment, but the defendant's worker's compensation carrier was in liquidation proceedings "and was subject to a stay." 868 N.E.2d at 891. Accordingly, the plaintiff did not receive any worker's compensation benefits. In the meantime, the plaintiff filed a third party lawsuit against the motorist who caused his injuries, and the plaintiff ultimately settled that claim without the knowledge or consent of the defendant or the defendant's worker's compensation carrier.

A Single Hearing Member of the Board granted the defendant's motion to dismiss the plaintiff's Application pursuant to Indiana Code Section 22-3-2-13. But the Full Board reversed that decision and reinstated the Application. On appeal, we reversed the Full Board and dismissed the plaintiff's Application. We held that

Paragraph Two of Ind. Code § 22-3-2-13 requires us to hold Doerr's settlement with the third-party tortfeasor without the written consent of [his employer or worker's compensation carrier], relieved [his employer] of liability for Doerr's worker's compensation claim. If the legislature intended a different result under these facts, then we must leave it to the legislature to modify Ind. Code § 22-3-2-13. The decision of the Full Worker's Compensation Board is reversed, and Doerr's application for adjustment is dismissed.

Doerr, 868 N.E.2d at 894.

Likewise, here, Hawn had not yet received any worker's compensation benefits when he settled the third party lawsuit.<sup>1</sup> The sole distinguishing factor is that the plaintiff in Doerr did not obtain worker's compensation benefits prior to the settlement of the third party lawsuit because the worker's compensation carrier was in liquidation. Here, Hawn asserts that, "by agreement of counsel," his worker's compensation claim "was allowed to languish to see what the results would be in the third party claim[.]" Brief of

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<sup>1</sup> Hawn does not direct us to any evidence of the total amount of his damages that resulted from the accident.

Appellant at 4. But there is no evidence of such an agreement in the record on appeal. And, regardless, the undisputed evidence shows that Hawn did not obtain Inland's consent prior to settlement.<sup>2</sup> Indiana Code Section 22-3-2-13 applies here and bars Hawn's Application for adjustment of claim. The Board correctly applied the law when it dismissed the Application.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.

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<sup>2</sup> Hawn maintains that Inland's knowledge of the third party lawsuit shows that Inland "tacitly consented to the settlement." Brief of Appellant at 12. But our holding in Doerr is clear that actual consent is required to avoid the harsh result under Indiana Code Section 22-3-2-13. As we observed in Doerr, consent is required because "[p]ermitting an employee to obtain a 'quick and cheap' settlement with the third-party tortfeasor, and then requiring an employer to exchange unlimited benefits for whatever miniscule settlement the employee might enter, does not protect the financial interests of the employer." 868 N.E.2d at 893.